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CALIFORNIA'S TIDELAND TRUST: SHORING IT UP

The competition for available land space in California's coastal zone is intense.¹ Even though the coastal zone comprises a mere 8 percent of the state's total land mass, it already contains 90 percent of the state's population.² Furthermore, the coastal population will increase by another 40 percent within the next 10 years.³ Indeed, it has been estimated that if land continues to be absorbed at the present rate in the San Francisco Bay Area and along the southern coast, all habitable land in those two areas will be completely occupied by 1990.⁴

In view of this widespread and rapid growth, one might reasonably expect to find a comprehensive plan regulating development of the coastal zone. Unfortunately, such a plan does not yet exist. Until very recently the only principle regulating development has been expediency, with very little concern for the future.⁵ As a result, California's valuable shoreline has all too often been the victim of "helter-skelter development."⁶

Often with the encouragement of local governments seeking additional tax revenues, developers have been draining, dredging and filling coastal lands at a slow but inexorable rate with the ecological consequences becoming apparent only after severe permanent damage has been inflicted.⁷ The estuaries, areas of inestimable ecological significance,⁸ have been destroyed at an alarming rate.⁹ Shoreline marshes, so important for wildlife conservation,¹⁰ have encountered a similar

1. COMMITTEE ON OCEAN RESOURCES, RESOURCES AGENCY OF CALIFORNIA, CALIFORNIA AND THE OCEAN 81 (1966).

2. CALIFORNIA ADVISORY COMMISSION ON MARINE AND COASTAL RESOURCES & THE INTERAGENCY COUNCIL ON OCEAN RESOURCES, CALIFORNIA'S COASTAL ZONE (unpaginated summary 1968).

3. COMMISSION ON OCEAN RESOURCES, *supra* note 1, at 105.

4. CALIFORNIA ADVISORY COMMISSION ON MARINE AND COASTAL RESOURCES, *supra* note 2.

5. CALIFORNIA ASSEMBLY COMMITTEE ON NATURAL RESOURCES, PLANNING AND PUBLIC WORKS, TIDE AND SUBMERGED LANDS 151 (1964).

6. HOUSE COMMITTEE ON GOVERNMENTAL OPERATIONS, PROTECTING AMERICA'S ESTUARIES: THE SAN FRANCISCO BAY AND DELTA, H.R. REP. NO. 1433, 91st Cong., 2d Sess. 3 (1970).

7. COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT 177 (1970).

8. *See, e.g., id.* at 176.

9. In the short period between 1947 and 1967 California lost 67 percent of its estuarine habitat. *Hearings on the Estuarine Areas Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 30-31 (1967).

10. *See, e.g., H. HARVEY, REPORT TO THE SAN FRANCISCO BAY CONSERVATION AND*

fate.¹¹ As summed up in one study, there are now coastal areas in the state that are faced with a genuine "environmental crisis."¹²

While there may be reason for apprehension about the nation's ability to correct its past land abuses,¹³ it is possible to be more optimistic about eventually halting the deleterious over-development that has plagued the state's coastal zone. A basis for reform already exists in the state, for when California was ceded to the United States by the Treaty of Guadalupe Hidalgo¹⁴ all of the state's tidelands¹⁵ automatically became the subject of a public trust.¹⁶ As a result, there is now a firmly established judicial precedent for protecting the "public interest" in those lands.

California courts have traditionally limited utilization of the trust to the promotion of commerce, the fisheries and navigation.¹⁷ Commercial exploitation of the coastal zone, however, has proceeded to a point that no longer permits such a shortsighted view. The "public interest" is a concept sufficiently flexible to expand in a manner consistent with contemporary concern for environmental quality, and judicial interpretation of the trust should reflect this fact. Not only is there nothing to preclude broadening the scope of the public interest to include environmental considerations, but it seems quite clear that this must be accomplished if the trust is to have any relevance to the present needs

DEVELOPMENT COMM'N: SOME ECOLOGICAL ASPECTS OF SAN FRANCISCO BAY 20 (1966).

11. Of the original three and one-half million acres of shoreline marsh in the state, less than a half-million acres remain. 1 CALIFORNIA FISH AND GAME COMM'N, CALIFORNIA FISH AND WILDLIFE PLAN 54 (1966).

12. HOUSE COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 6.

13. "Misuse of the land is now one of the most serious and difficult challenges to environmental quality, because it is the most out of hand and irreversible." COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 7, at 165.

14. Treaty with Mexico, Feb. 2, 1848, 9 Stat. 922 (1848), T.S. No. 207.

15. In California "tideland" has been defined as the land that is "covered and uncovered by the daily flux and reflux of the tides." *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 182, 50 P. 277, 285 (1897). On this subject two points require mention: first, there is a conflict between state and federal decisions defining landward boundaries of the tidelands. State decisions hold that the landward boundary is the ordinary high water mark set by the neap tides (the tides midway between spring tides and, consequently, least in height). Federal decisions, on the other hand, fix the landward boundary a little higher on the shore at an imaginary line determined by averaging the height for the tides over the scientifically established period of 18.6 years. *See People v. William Kent Estate Co.*, 242 Cal. App. 2d 156, 159-61, 51 Cal. Rptr. 215, 218-19 (1966). Second, it should be noted that "tidelands" as used in connection with the tideland trust includes submerged lands as well as those lands covered and uncovered by the daily flux of the tides. *San Pedro, L.A. & S.L. R.R. v. Hamilton*, 161 Cal. 610, 614, 119 P. 1073, 1074 (1911).

16. *People v. California Fish Co.*, 166 Cal. 576, 596, 138 P. 79, 87 (1913).

17. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

of the state.¹⁸

I. Historical Origins of the Tideland Trust

The tideland trust is not a contemporary legal development, and its effective use requires some understanding of its Roman origins, its modification under English law and its early treatment by American courts.¹⁹ Only by examining the evolution of the trust doctrine does it become apparent that the trust has neither a life of its own nor any intrinsic content.²⁰ Rather, it has always been the product of the socio-historic context in which it has found articulation.

Under Roman law the public's right to use the seashore was almost unrestricted. This is perhaps best illustrated by a passage from Justinian's *Institutes* which declared that:

The public use of the seashore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to anyone as private property. . . .²¹

With the decline of the Roman Empire, the influence exerted by Roman institutions lessened and the strength of indigenous customs correspondingly increased. In the early days of post-Roman England, the vitality of the public's earlier interest in the tidelands yielded to the stresses of absolute kingly power which rose to fill the vacuum created by the waning of imperial protection. Until the Magna Charta was signed in 1215, the prerogatives of the prestigious Anglo-Saxon and Norman rulers went largely unchallenged. During this period public ownership of the tidelands entered a difficult stage, with English rulers coming to see themselves as possessing definite private interests in those lands which they could, and did, alienate freely to deserving subjects.²²

Despite the pressures exerted by these early sovereigns, the concept of a public interest in the tidelands remained viable and public rights of "egress and regress for fishing, trading and other uses" were preserved.²³ As Lord Hale pointed out in his now classic *De Jure Maris* in 1786,²⁴ even though the king was able to forge extensive inroads into

18. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

19. For an extensive historical treatment of this subject, see Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

20. See Sax, *supra* note 18, at 521.

21. INSTITUTES 2.1.5.

22. For an extensively documented study of royal conveyancing of tidelands before the Magna Charta, see S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO ch. 1 (1888).

23. R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM 106 (2d ed. 1875).

24. Reprinted in S. MOORE, *supra* note 22, at 370-413.

the public tideland rights by making private grants, the rights of private grantees (*jus privatum*) were always viewed as subservient to the rights of the public (*jus publicum*).²⁵

This is not to say that Parliament was inactive. To the contrary, Parliament took a special interest in the public's use of the shoreline. Public rights were "modified, promoted, or restrained by the common law, and by numerous acts of parliament relating to the fisheries, the revenues and the public safety. . . ." ²⁶ Thus, regulating the tidelands was viewed as a legitimate exercise of the police power.

While the concept of a public interest in the tidelands was perpetuated it also remained elusive. Often the public right was described in very broad terms, as in *Bagott v. Orr*,²⁷ where the court referred to it as "the right of the subject to use the shore of the sea in every way in which it could be serviceable to him."²⁸ At other times it was implied that perhaps that interest might even defy description; in *Blundell v. Catterall*²⁹ the court noted that:

[t]he passages cited from Lord Hale's treatise, *De Jure Maris* . . . in which it is laid down, "that the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use;" leave the question untouched; because the question in this case is, what the *jus publicum* is: and that they do not define.³⁰

The concept that public rights existed in the tidelands was also incorporated into early American law. With the vesting of sovereignty in the people, additional stress was placed on the unrestricted right of the public. The nature of this right was stated quite clearly in *Martin v. Waddell*,³¹ an early United States Supreme Court decision on the subject which noted that:

When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the *absolute right* to all their navigable waters and the soils under them for their own common use. . . .³²

Perhaps the most celebrated American tidelands trust decision, squarely within the *Martin v. Waddell* tradition, is that of *Illinois Central Railroad Co. v. Illinois*.³³ The dispute in that case centered around the

25. *Id.* at 404-05.

26. R. HALL, *supra* note 23, at 108.

27. 126 Eng. Rep. 1391 (C.P. 1801).

28. *Id.* at 1394.

29. 106 Eng. Rep. 1190 (K.B. 1821).

30. *Id.* at 1204. The constantly changing nature of the *jus publicum* is explored in section VI *infra*.

31. 41 U.S. (16 Pet.) 367 (1842).

32. *Id.* at 410 (emphasis added).

33. 146 U.S. 387 (1892).

validity of a deed by which the state of Illinois purported to convey to the defendant railroad scandalously large holdings of land along Chicago's lake front.³⁴ The blatant disregard for the public, evidenced by the size of the transaction, was brought to the attention of the United States Supreme Court and the grant was held to be invalid.

The importance of this "lodestar"³⁵ of American public trust law is the reasoning used by the court in reaching its conclusion. The court held that because the lands conveyed were tidelands, they were necessarily trust lands;³⁶ therefore, the conveyance could only be valid if it in some way promoted the public interest in commerce, the fisheries or navigation.³⁷ Because the lands conveyed were so extensive, the court held that the only effect the grant could have would be to prejudice the public's rights,³⁸ and that the entire conveyance was therefore invalid.³⁹

II. Development of the Trust in California

A. The Trust and the California Legislature

The phenomenon of private interests seeking to exploit tidelands for their own pecuniary gain, dealt with in *Illinois Central*, is not foreign to California's past. Recently it was noted that in California "existing State policy governing state-owned lands emphasizes disposal, rather than creative management of these lands for a variety of uses in the public interest."⁴⁰ Unfortunately, in the case of the state's tidelands, this policy was early established with, thousands of acres being sold into private hands in the first few decades of the state's existence.⁴¹ Abuses and injustices in connection with those early grants seem to have been rampant.⁴² Indeed, when the constitutional convention met in 1878,

34. The grant covered over a thousand acres of tideland located in the heart of Chicago's harbor. It was more than three times the size of the outer harbor, which it included along with adjacent lands suitable for future harbor facilities. The grant was as large as the then-existing merchandise docks along the Thames at London; it was larger than Liverpool's dock and basin area and twice the size of the port of Marseilles. *Id.* at 454.

35. See Sax, *supra* note 18, at 489-91, where the author maintains that the significance of the *Illinois Central* holding is its illustration of the principle that "when a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties." *Id.* at 490.

36. 146 U.S. at 452.

37. *Id.*

38. *Id.* at 453.

39. *Id.* at 463-64.

40. CALIFORNIA FISH AND GAME COMM'N, *supra* note 11, at 29.

41. M. SCOTT, THE FUTURE OF SAN FRANCISCO BAY 3 (1963).

42. In Los Angeles County the Central Pacific Railroad had bought all the tideland frontage along the San Pedro harbor and was requiring all wharf construction to be cleared through its offices. In the San Francisco Bay Area it was not uncommon

an intense debate ensued over the means of correcting such abuses, and delegate N.G. Wyatt told those assembled that:

If there is any one abuse greater than another that I think the people of the State of California have suffered at the hands of their lawmaking power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State.⁴³

To Wyatt's remarks, delegate Hager added:

This question of tidelands has been before the Legislature again and again. As we all know, a great many abuses have grown out of the management and sale of tidelands in this state. . . .⁴⁴

Finally, the delegates ratified article XV, sections 2 and 3.⁴⁵ Section 2 is fairly broad in scope and guarantees access to all navigable water in the state for any public purpose. Section 3 prohibits the alienation of any tidelands from the trust when they are located within 2 miles of "any incorporated city, city and county, or town." These enactments have erroneously been credited with saving the tidelands from complete capture by private interests;⁴⁶ in fact, they went no further than prior

for unscrupulous speculators to purchase tideland lots and then force owners of abutting dry lands to pay extortionate prices for mud flats in order to regain their bay access. *Id.* at 9.

43. 2 E. WILLIS & P. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1038 (1880).

44. 3 *id.* at 1480.

45. Section 2 provides:

"People Shall Always Have Access to Navigable Waters

Sec. 2. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Section 3 provides:

"Tidelands Not to Pass Into Private Hands

Sec. 3. All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

In 1962, § 3 was amended to include the following addition:

"Provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest."

46. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMM'N, OWNERSHIP: A REPORT 22 (1968).

statutes had gone.⁴⁷ They did have the one advantage, however, of being difficult to change, and therefore constituted a long overdue recognition that the value of the state's tidelands entailed more than just what they could bring on the open market. In 1909 the legislature finally passed a total ban on the further sale in fee simple of any and all remaining tidelands.⁴⁸

Nothing in present California law, however, precludes leases and grants-in-trust of the tidelands. By these two means municipalities to this day are allowed to receive tidelands on the condition that they devote them to trust purposes; that is, the promotion of commerce, the fisheries and navigation. Unfortunately, such grants and leases are often extremely permissive.⁴⁹ A recent grant,⁵⁰ for example, specifically allows development of the land for power lines, convention centers, snackbars, hotels, motels and apartment buildings, to name just a few of the authorized uses.⁵¹ So far, such grants have not been invalidated by the courts; but, as opined by one writer, that is perhaps due to the fact that no one has yet seen fit to challenge them.⁵²

B. Judicial Interpretation of the Trust

California courts have always been receptive to the idea that the public has certain inalienable rights in the state's tidelands; indeed, the precedent established in *Illinois Central* has been cited and quoted with approval in numerous California decisions.⁵³ Until recently the leading California decision on the tideland trust was *People v. California Fish*

47. See, e.g., *San Pedro, L.A. & S.L.R.R. v. Hamilton*, 161 Cal. 610, 618-19, 119 P. 1073, 1076 (1911), citing Cal. Stat. 1869-1870, ch. 573, § 70, at 877-78.

48. CAL. PUB. RES. CODE § 7991.

49. E.g., Cal. Stat. 1911, ch. 654, at 1258 & ch. 657, at 1258, which constitute a grant to Oakland authorizing the city to make leases for "any and all purposes which shall not interfere with navigation or commerce." *Id.* ch. 654, at 1255. A grant to Los Angeles allows the city to make leases "for purposes consistent with the trust upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor." *Id.* ch. 656, at 1256.

50. Cal. Stat. 1961, ch. 1763, § 1, at 3767-70.

51. Sax, *supra* note 18, at 536-38 contends that in the last analysis these statutes are not nearly as broad as they seem, because they often contain a general clause requiring compliance with the trust. See note 49 *supra*.

52. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMM'N, *supra* note 46, at 10, where it is noted that numerous uses authorized in grants affecting San Francisco Bay have not yet been made the subject of court tests even though many of them would appear to be questionable.

53. E.g., *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 206, 282 P.2d 481, 485 (1955); *City of Long Beach v. Morse*, 31 Cal. 2d 254, 262, 188 P.2d 17, 22 (1947); *Atwood v. Hammond*, 4 Cal. 2d 31, 39, 48 P.2d 20, 25 (1935); *Boone v. Kingsbury*, 206 Cal. 148, 182-83, 273 P. 797, 812 (1928); *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82 (1913); *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 262, 90 P. 532, 535 (1907); *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 182-84, 50 P. 277, 285-86 (1897).

Co.,⁵⁴ which attempted to list systematically the terms of the trust.⁵⁵ The status of that decision has been preempted, however, by the recent treatment found in *City of Long Beach v. Mansell*,⁵⁶ in which the California Supreme Court grappled with the problem of deciding when the state can be estopped from asserting that certain tidelands being used for non-trust purposes are still subject to the trust. In the process of formulating *Mansell* the court, consolidated *California Fish* and the cases decided subsequent to it. The principles announced in *Mansell*, *California Fish* and other judicial decisions together with applicable legislative enactments constitute a comprehensive list of the trust terms:

1. The tidelands of the state are subject to a public trust for the people of the state.⁵⁷ The purpose of that trust has traditionally been delineated in terms of the promotion of commerce, the fisheries and navigation.⁵⁸

2. Administration of the trust is committed to the legislature,⁵⁹ which in turn has delegated management operations to the State Lands Commission.⁶⁰

3. The powers of the state as trustee are not expressed but are commensurate with the duties of the trust.⁶¹ This permits the state to do whatever is necessary for the proper administration of the trust.⁶²

4. Since 1909 the sale of any and all tidelands in the state has been forbidden by statute.⁶³ Attempted sales are void.⁶⁴ Grants-in-trust and leases, however, are permissible.⁶⁵

5. In its administration of the trust, the state may properly find it necessary or advisable to segregate certain tidelands from water access and thereby render them useless for trust purposes.⁶⁶ This may be done, however, only when it will not lead to substantial impairment of the public interest in the remaining lands and waters.⁶⁷ If the state,

54. 166 Cal. 576, 138 P. 79 (1913).

55. *Id.* at 596-99, 138 P. at 87-88.

56. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

57. See text accompanying note 16 *supra*.

58. See text accompanying note 17 *supra*.

59. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n.17, 476 P.2d 423, 437 n.17, 91 Cal. Rptr. 23, 37 n.17 (1970); *People v. California Fish Co.*, 166 Cal. 576, 597, 138 P. 79, 87 (1913). See also *City of Long Beach v. Lisenby*, 175 Cal. 575, 579, 166 P. 333, 336 (1917).

60. CAL. PUB. RES. CODE § 6301.

61. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

62. *Id.* at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.

63. CAL. PUB. RES. CODE § 7991.

64. 3 Cal. 3d at 482 n.18, 476 P.2d at 437 n.18, 91 Cal. Rptr. at 37 n.18.

65. See text accompanying notes 49-52 *supra*.

66. 3 Cal. 3d at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.

67. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892).

through the legislature, determines that such lands are no longer useful for trust purposes,⁶⁸ the appropriate lands may be freed from the trust and irrevocably alienated into absolute private ownership, provided that article XV, section 3, does not apply.⁶⁹ Whether such a determination is necessary prior to tideland disposal is an unsettled issue;⁷⁰ the legislature, however, appears to have assumed it to be necessary, or at least highly desirable, judging from past statutes making tideland grants.⁷¹

6. Where the legislature has made a determination that certain tidelands are no longer useful for trust purposes and that those lands are free from the trust, such determination will be conclusive on courts called upon to review it unless there is evidence that the proposed legislative action will impair the power of successive legislatures to administer the trust in a manner consistent with its broad purposes.⁷² Whether legislative intent to terminate the trust is ineffective when there is evidence that the physical condition of the land does not preclude enjoyment of the public trust also appears to be an unsettled question.⁷³

7. In construing statutory determinations purporting to authorize an abandonment of the public servitude, the courts will look for a clearly expressed or necessarily implied legislative intention to that effect. Such intent will not be implied if any other inference is reasonably possible; and if any interpretation of the statute in question is reasonably possible that would not involve a destruction of the public servitude or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.⁷⁴

8. Where tidelands are still subject to the trust, the trust may be partially revoked as to those lands to allow income derived from the extraction of minerals imbedded in the lands to be used for purposes outside the trust so long as no substantial prejudice to the public servitude results.⁷⁵

9. Where the tidelands have not been freed from the trust, they

68. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

69. *Id.* at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.

70. See Opinion Letter from the Office of the California Att'y General to the Executive Director, San Francisco Bay Conservation and Development Comm'n, re: *Request for Opinion on Public Easement for Navigation and Fishing* 12-14 (Jan. 29, 1968).

71. *Id.* at 14.

72. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n.17, 476 P.2d 423, 437 n.17, 91 Cal. Rptr. 23, 37 n.17 (1970); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 207, 282 P.2d 481, 486 (1955).

73. See, e.g., Comment, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CAL. L. REV. 728, 772-77 (1967).

74. *People v. California Fish Co.*, 166 Cal. 576, 597, 138 P. 79, 88 (1913).

75. *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 206, 282 P.2d 481, 485 (1955).

may still be altered or disposed of in a manner consistent with the interests of commerce, the fisheries and navigation.⁷⁶ So long as tidelands remain subject to the trust, however, they may not be alienated into absolute private ownership;⁷⁷ attempted alienation in violation of this restriction passes only bare title with the tidelands remaining subject to public easement.⁷⁸ Conveyances of this nature made after the 1909 statutory bar on the further sale of any and all tidelands are, of course, void *ab initio*.⁷⁹ Where there is evidence that the state has knowingly allowed tideland owners to erroneously believe that their lands are free of the trust, the state may be estopped from asserting the continued existence of the trust as to those lands.⁸⁰ This is an extraordinary remedy, however, and rarely will be granted.⁸¹

10. Where tidelands have been conveyed subject to the trust, the grantee may use the granted lands as he sees fit, subject to the power of the state as trustee to abate any nuisance created thereon and to remove any purpresture erected thereon.⁸²

11. The state's jurisdiction over the tidelands is subservient to the jurisdiction of the Federal Government in matters of commerce, navigation, national defense and international affairs.⁸³

III. Trust Enforcement

Enforcement of the tideland trust can be readily divided into two categories: (1) enforcement by the state to abate interferences with its management of the trust; and (2) enforcement by private citizens in their beneficiary capacity when the state has been remiss in its duties as trustee. Regarding the former, it has already been pointed out that the state may bring actions to abate nuisances and to remove purprestures on tidelands not freed from the trust; the Attorney General has ample authority and standing to sue for these purposes.⁸⁴ The precise nature of an actionable misuse of the tidelands has not been clearly defined in the decisions to date; rather the courts seem to feel that "each case of this kind [is] to be determined upon its own merits."⁸⁵ Generally, how-

76. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

77. *Id.*, 476 P.2d at 437, 91 Cal. Rptr. at 37.

78. *Id.*, 476 P.2d at 437, 91 Cal. Rptr. at 37.

79. *Id.* at 482 n.18, 476 P.2d at 437 n.18, 91 Cal. Rptr. at 37 n.18.

80. *Id.* at 487-501, 476 P.2d at 441-51, 91 Cal. Rptr. at 41-51.

81. *See id.* at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.

82. *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79, 88 (1913). While a purpresture is not per se a nuisance, the state may still determine that the "public good" requires its removal. *Coburn v. Ames*, 52 Cal. 385, 397 (1877).

83. Submerged Lands Act, 43 U.S.C. § 1314 (1964).

84. *See, e.g., People v. Oakland Water Front Co.*, 118 Cal. 234, 240, 50 P. 305, 306 (1897). *See also* note 82 & accompanying text *supra*.

85. *People v. Southern Pacific R.R.*, 166 Cal. 614, 620, 138 P. 94, 97 (1913).

ever, anything which obstructs the free use of the tidelands by the public can probably be enjoined by the state.⁸⁶

Unfortunately, existing California cases on private enforcement of the tideland trust provide only skeletal guidelines for future litigation. One of the more illuminating decisions is that of *City of Hermosa Beach v. Superior Court*.⁸⁷ In that case the respondent, suing as a private citizen, was seeking an injunction against the erection of fences and against the construction of a road on a stretch of beach deeded to the city subject to the condition that it be used as a "public pleasure ground."⁸⁸ The city answered by requesting a writ of prohibition against further litigation on the ground that citizens lacked standing to bring such actions. In refusing to grant the city's request, the appellate court held that land dedicated to public use, such as the beach property involved here, could be "loosely referred to as a public trust"⁸⁹ and that respondent's standing as a "resident and taxpayer" sufficiently qualified her to "bring suit to enforce the duty of a municipality to maintain a park according to the terms of the dedication."⁹⁰

Another pertinent decision is that of *Silver v. City of Los Angeles*,⁹¹ in which plaintiff brought an action to have declared void, and to set aside, an oil and gas lease between defendant City of Los Angeles, as lessor, and defendant Los Angeles Harbor Oil Company, as lessee. Significantly, the court recognized that a taxpayer in his representative capacity could bring an action against a municipality where there was evidence of "fraud, collusion, ultra vires or a failure on the part of a governmental body to perform a duty specifically enjoined."⁹² However, since the parties had stipulated that there was no actual fraud, corruption, bad faith, or undue influence and ultra vires was not pleaded,⁹³ the only recourse for the court was to find that a cause of action had not been adequately stated.

Totally different considerations, however, enter into environmental litigation. If plaintiffs were to produce evidence that a lease, such as the one in *Silver*, constituted deleterious over-development or unsound eco-management of the trust *res*, it would seem that an ultra vires act could be established; under such circumstances the court would clearly be presented with a justiciable cause of action wholly within the *Silver* rationale.

In other states there is growing judicial recognition that:

86. See CAL. CIV. CODE §§ 3479-80, 3494.

87. 231 Cal. App. 2d 295, 41 Cal. Rptr. 796 (1964).

88. *Id.* at 296-97, 41 Cal. Rptr. at 797.

89. *Id.* at 299, 41 Cal. Rptr. at 799.

90. *Id.* at 311, 41 Cal. Rptr. at 799.

91. 57 Cal. 2d 39, 366 P.2d 651, 17 Cal. Rptr. 379 (1961).

92. *Id.* at 40-41, 366 P.2d at 652, 17 Cal. Rptr. at 380.

93. *Id.*

self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests.⁹⁴

Indeed, the courts are gradually beginning to realize that administrative agencies wield unprecedented power and that these entities do not necessarily function properly without constant and close scrutiny. Accordingly, the courts are intervening in the administrative aspects of government with increasing frequency when members of the public seek judicial review of seemingly arbitrary administrative action perceived to be contrary to the public interest.⁹⁵

As a consequence, other jurisdictions have been receptive to citizens seeking to establish their rights as beneficiaries of public trusts. Even before the turn of the century, the standing of trust beneficiaries received judicial approval. In *Davenport v. Buffington*⁹⁶ the circuit court of appeals was dealing with the sale of public park lands to private interests in violation of an original grant; private citizens were seeking to bar the sale. The court held for the plaintiffs, stating that:

[T]he enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee . . . is one of the cestuis que use for whom these parks are held in trust, and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses.⁹⁷

A more recent case is that of *Archbold v. McLaughlin*,⁹⁸ where the plaintiffs sought to have a dedication of land for park purposes specifically enforced over the objection of officials in the District of Columbia, who wanted to construct a highway through the area. In denying a motion by the district officials to dismiss the complaint, the federal district court held that:

Land dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city or town in which the park is located may maintain a suit in equity to pre-

94. Sax, *supra* note 18, at 650.

95. See, e.g., *Citizen's Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970), where the court found clear evidence of congressional intent for the Federal Administrative Procedure Act to "assure comprehensive review of 'a broad spectrum of administrative actions.'" But see McIntire, *Necessity in Condemnation Cases—Who Speaks for the People?*, 22 HASTINGS L.J. 561 (1971).

96. 97 F. 234 (8th Cir. 1899).

97. 97 F. at 236-37.

98. 181 F. Supp. 175 (D.D.C. 1960), cited with approval in *Allen v. Hickel*, 424 F.2d 944, 947 n.5 (D.D.C. 1970).

vent diversion of the use of such land. . . .⁹⁹

Michigan has codified the public's right to enforce public trusts in its Environmental Protection Act of 1970.¹⁰⁰ The key provisions of that statute enable any governmental agency, person or legal entity to seek equitable relief against any other governmental agency, person or legal entity when necessary to protect the air, water and other natural resources and the *public trust* therein from pollution, impairment or destruction.¹⁰¹ The act further provides that the plaintiff has made a *prima facie* case when he has shown that the defendant has polluted, or is likely to pollute or to destroy the air, water and other natural resources or the *public trust* therein.¹⁰²

If Californians have a right to any tideland benefits, it must ultimately flow from the public trust protecting those lands. As evidenced by the above cases, and in particular by the Michigan statute, private citizens have a right to enforce public trusts; with their undisputed status as a trust *res*, the tidelands certainly should receive similar protection.

IV. The Role of Commercial Growth in Trust Administration

California decisions dealing with the tideland trust have in the past evidenced an apparent inflexibility of purpose. A cursory analysis of the trust terms, for example, indicates that the trust is designed to promote commerce, the fisheries and navigation and that its terms have been reduced to a set of fixed and readily enforceable standards. Actually, nothing could be further from the truth; at the very heart of the cases is a concern for the "public interest," and that, as indicated in *Blundell v. Catterall*,¹⁰³ has never been adequately defined.

Understanding how the courts have interpreted what Justice Frankfurter called that "vague impalpable but all-controlling consideration, the public interest"¹⁰⁴ is a prerequisite to understanding how environmental degradation of the coastal zone continued to increase even as the California courts were ostensibly protecting the public interest in the tidelands. Interpretation of the public interest has varied both historically and among jurisdictions; as indicated by Justice Gray in *Shively v. Bowlby*,¹⁰⁵ each state has dealt with its tidelands "according to its own views of justice and policy. . . ."¹⁰⁶ In California, justice and policy have stressed growth and economic expansion.

99. 181 F. Supp. at 180.

100. MICH. COMP. LAWS ANN. §§ 691.1201-691.1207.

101. *Id.*

102. *See id.*

103. *See* text accompanying notes 29-30 *supra*.

104. F. FRANKFURTER, FELIX FRANKFURTER REMINISCES 72 (1960).

105. 152 U.S. 1 (1893).

106. *Id.* at 26.

Early in its history, California formalized a judicial rationale which transformed the goals of private individuals into public policies. This is well documented in the history of the state's administrative land agencies¹⁰⁷ but is perhaps most strikingly illustrated by judicial decisions interpreting the policies of those agencies. As stated in a recent report prepared by the legislature:

Since man's main concern from the beginning of California's development has been the exploitation of resources to develop the economy, the bulk of the law and the weight of judicial precedent has tended to favor special interests.¹⁰⁸

In other words, since its earliest days, California has felt that unbridled economic expansion was in the public's best interest. The courts have enforced the tideland trust accordingly. One particularly illuminating example of this judicial attitude can be found in *Boone v. Kingsbury*.¹⁰⁹ The dispute there stemmed from the Surveyor-General's refusal to issue permits to the plaintiffs for oil prospecting in southern California tidelands. One of the grounds for refusal was the fear that the contemplated drilling operations would pollute the surrounding ocean and harm the marine life found there.¹¹⁰ In ordering issuance of the permit over the Surveyor-General's protest, the court stated:

In fact, the development of mineral resources, of which oil and gas are among the most important, is the settled policy of state and nation, and the courts should not hamper this manifest policy except upon the existence of the most practical and substantial grounds.¹¹¹

An emphasis on economic growth is manifest in the court's relatively unrestricted view regarding harbor appurtenances. The broadest decision to date is probably *Martin v. Smith*,¹¹² in which the district court of appeals, without any examination of the tideland trust doctrine, refused to permit a referendum to void a city's lease of its tidelands for construction of a restaurant, bar, motel, swimming pool, shopping complex and a parking area. In seeming justification the court unqualifiedly asserted that such a lease was "consistent with the trust upon which said lands were conveyed to the city and with the requirements of commerce and navigation of [the] harbor."¹¹³

The court's passing reference in *Martin* to the city's part in the transaction is significant because it touches on a further manifestation

107. See, e.g., G. NASH, STATE GOVERNMENT AND ECONOMIC DEVELOPMENT 124-36, 207-12, 339-58 (1964).

108. CALIFORNIA ASSEMBLY SELECT COMM. ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS 18 (1970).

109. 206 Cal. 148, 273 P. 797 (1928).

110. *Id.* at 168, 273 P. at 806.

111. *Id.* at 182, 273 P. at 812.

112. 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960).

113. *Id.* at 578, 7 Cal. Rptr. at 728.

of the state's stress on growth and expansion. Since the 1950s tideland grants have usually included a provision requiring that the lands granted be substantially improved within 10 years and that failure to comply with such provisions would result in reversion of the granted lands to the state.¹¹⁴ It is manifest that provisions such as these constitute unwarranted pressure on the grantees to actively solicit development even where environmentally the best use might be no use at all.¹¹⁵ The lands granted to the municipality in *Martin* were subject to a 10-year development proviso,¹¹⁶ and the court's condoning such extensive commercial development of the tidelands was undoubtedly based in part upon its awareness of this provision and the city's desire to comply with it.

The pro-consumption reasoning displayed in *Boone* and *Martin* constitutes an open invitation to developers to attempt to obtain permission for all manner of questionable projects. Implicit in these decisions is a judicial attitude that any project which benefits the state's commerce, the fisheries or navigation is within the purpose of the trust, regardless of the environmental or ecological toll which might be exacted as a consequence. Such a rationale could conceivably be used to justify extensive dredging and filling for a lucrative housing subdivision as long as the developers were careful to include marina facilities in their master plan, thereby benefitting navigation, however secondarily. The fallacy in such reasoning is apparent, for the hypothesis ignores the fact that, as trustee of the tidelands, the state is under a duty to use reasonable care and skill in preserving the trust *res*¹¹⁷ and that ecologically unsound practices ought to be prohibited as violative of the trustee's fiduciary duties.

V. Reappraising the "Public Interest"

There is a recognized need for reappraisal of the tideland trust as a tool for environmental improvement. One authoritative pronouncement to this effect in California is the 1967 Marine Resources Development Act,¹¹⁸ wherein the legislature stated that:

It is hereby declared to be the policy of the State of California to develop, encourage, and maintain a comprehensive, coordinated State plan for the orderly, long-range conservation and development of marine and coastal resources which will ensure their wise multiple use in the total public interest.¹¹⁹

114. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMM'N, *supra* note 46, at 11.

115. Such provisions were singled out for special criticism in CALIFORNIA ASSEMBLY SELECT COMM. ON ENVIRONMENTAL QUALITY, *supra* note 46, at 32.

116. Cal. Stat. 1953, ch. 534, § 1, at 1796.

117. RESTATEMENT (SECOND) OF TRUSTS § 176 (1959).

118. CAL. GOV'T CODE §§ 8800-27.

119. *Id.* at § 8800. Several states have already met this problem with farsighted legislative enactments. In Florida, for example, before public lands may be sold there

Certainly the use of the words "conservation and development of marine and coastal resources," when juxtaposed with "total public interest," imparts a concern for more than the promotion of commerce, the fisheries and navigation, as well as a disenchantment with past administrative policies.¹²⁰

Although the statute has not expressly converted the tideland trust into an environmental trust, it is indicative of a legislative belief that commercial development of the tidelands may have proceeded too far without regard for other, equally important factors. As such it can be construed as reflecting a legislative intent to adopt a new approach in management of the tidelands—an approach which adheres to recently acquired ecological insights into the complex web of biological relationships found in those areas.¹²¹ It ought, therefore, to provide the courts with a mandate for protecting the expanding public interest both in environmental quality and in the recreational, educational and aesthetic utilization of the tidelands¹²² by bestowing official sanction on such nonconsumptive uses as the establishment of reserves for marine-biological study, wildlife refuges, parks, scenic easements and open space allocation.¹²³

Such an interpretation of the Marine Resources and Development

must be a biological survey and an ecological study made of the proposed sale area. FLA. STAT. ANN. § 253.12(7) (Supp. 1970). If as a result of those studies it appears that the sale would interfere with conservation of "fish, marine and wildlife or other natural resources, including beaches and shores, to such an extent as to be contrary to the public interest" the lands must be withdrawn from sale. *Id.* § 253.12(4). Oregon's approach is more comprehensive. It has declared its entire ocean shore a recreation area. ORE. REV. STAT. § 390.615 (1969). All improvements within this area must be authorized by permit. *Id.* § 390.640. Permits are granted after the following factors, among others, are considered: The public need for healthful, safe, aesthetic surroundings; the natural, scenic, recreational and other resources in the area; and the present and prospective need for conservation and development of those resources. *Id.* § 390.655(1).

120. Instrumental in bringing about such changes are reports like the 1966 California Fish and Wildlife Plan, *supra* note 11, wherein it was stated that: "We recognize conflicts among different uses of fish and wildlife resources and with other resource programs, but we are not willing to accept the view that economic growth and development should always be permitted precedence over the amenities of life." 1 CALIFORNIA FISH AND GAME COMM'N, CALIFORNIA FISH AND WILDLIFE PLAN 20 (1966).

121. See B. COMMONER, SCIENCE AND SURVIVAL 26 (1963).

122. See, e.g., *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 42-43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970), where the court declares that there is a "clear public policy in favor of encouraging and expanding" public use of shoreline areas. For a discussion of this decision, see Comment, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

123. See *Udall v. FPC*, 387 U.S. 428, 450 (1967), where the Supreme Court, in discussing the advisability of building a power plant, held that the test to be applied was whether or not the project was in the public interest, and that the test was not complete without knowledge of the ecological and overall environmental effects of the project.

Act would be in consonance with the attitude being adopted in other jurisdictions. In the recent case of *Texas Committee v. United States*,¹²⁴ for example, the federal district court granted a stay pending appeal to prevent the Farmer's Home Administration from expending public funds on a construction project, the environmental effects of which had not been adequately considered. Failure to take such effects into account was held to be in violation of the National Environmental Policy Act of 1969.¹²⁵ Citing the statutory language in which Congress recognized the "critical importance of restoring and maintaining environmental quality,"¹²⁶ the court concluded that it was "hard to imagine a clearer or stronger mandate to the Courts."¹²⁷ Why California should feel any different about protecting its tidelands is also "hard to imagine."¹²⁸

The Massachusetts judiciary has similarly, although less emphatically, reevaluated its role in supervising the administration of public trusts. *Commissioner of Natural Resources v. Volpe & Co.*¹²⁹ was based on the disarmingly simple, but much-ignored fact that even the traditional servitudes of commerce, the fisheries and navigation require adherence to sound ecological principles. In *Volpe* the Massachusetts Commissioner of Natural Resources had refused to permit the filling-in of tidal marshland for a development project. Initially his decision was upheld, but on appeal to the Massachusetts Supreme Court the case was remanded for additional evidence on the issue of the constitutionality of the taking of property. The appellate court, however, conceded that protecting the fisheries in the area required maintenance of the ecological balance in the lands sought to be filled.¹³⁰ By relating the necessity of preserving the areas's ecology to the traditional servitude of the fisheries, it was established that filling the tidelands was not in the public interest. To make this point it was shown that decaying plants in the marsh released nutrients essential to micro-organisms which in turn provided the primary source of nutrition for shellfish, young finfish and assorted species of crustaceans.¹³¹

VI. Precedents for Reappraisal

Important as the *Volpe* decision might be for its enlightened eco-

124. 1 BNA ENV. REP. *Current Decisions* 1303 (W.D. Tex., Feb. 5, 1970).

125. 42 U.S.C.A. §§ 4321-47 (1970).

126. *Id.* § 4331(a).

127. 1 BNA ENV. REP. *Current Decisions* at 1304.

128. In *Wilderness Soc'y v. Hickel*, 1 BNA ENV. REP. *Current Decisions* 1335 (D.D.C., Apr. 23, 1970), a preliminary injunction was issued, halting construction of an Alaska oil pipeline because there had been a failure to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (Supp. V, 1970).

129. 349 Mass. 104, 206 N.E.2d 666 (1965).

130. *Id.* at 106, 108, 206 N.E.2d at 669, 671.

131. *Id.*

logical awareness, ultimately it falls short of the mark because, in the last analysis, it still restricts the public interest in the tideland trust to the traditional confines of the commerce, fisheries and navigation servitudes. What is needed is authority for interpreting the trust doctrine to include environmental quality as a consideration having the same value as these traditional servitudes.

As a basic operating premise for further discussion, it is well to keep in mind the words of one eminent scholar who, in commenting on the trust's capacity to change to meet contemporary social needs, noted that:

The principle that the public has an interest in tidelands and banks of navigable waters and a right to use them for purposes for which there is a substantial public demand may be derived from the fact that the public won a right to passage over the shore for access to the sea for fishing when this was the area of substantial public demand. As time goes by, opportunities for much more extensive uses of these lands become available to the public. The assertion by the public of a right to enjoy additional uses is met by the assertion that the public right is defined and limited by precedent based upon past uses and past demand. But such a limitation confuses the application of the principle under given circumstances with the principle itself.

The law regarding the public use of property held in part for the benefit of the public must change as the public need changes. The words of Justice Cardozo, expressed in a different context nearly a half-century ago, are relevant today in our application of this law: "We may not suffer it to petrify at the cost of its animating principle."¹³²

Fortunately, there is some authority in California for the proposition that if a public trust is to remain relevant, its interpretation must reflect contemporary social needs. In *Colberg, Inc. v. State ex rel. Department of Public Works*¹³³ the California Supreme Court redefined the public servitude over navigable waters to meet the state's present requirements. The plaintiffs in *Colberg* were the owners of a shipyard located on a navigable branch of a tidal channel which ultimately connected their yard with the Pacific Ocean. They brought their action after the State Department of Public Works announced plans to construct a low-elevation freeway bridge across the primary channel leading to the ocean. Although the bridge would put the plaintiffs out of business by preventing ships from passing the remainder of the distance to plaintiff's shipyard, the court denied the plaintiffs any compensation and ruled that the construction of a vehicular bridge over navigable water was within the totality of a modern-day state's jurisdiction over navigable waters.

132. Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 *WATERS AND WATER RIGHTS* 202 (R. Clark ed. 1967).

133. 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

After explaining that the public trust governing navigable waterways and the lands lying beneath them has always been interpreted liberally to benefit the public as a whole,¹³⁴ the court concluded that:

[T]he law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters. . . .

The limitation of the servitude to cases involving a strict navigational purpose stems from a time when the sole use of navigable waterways for purposes of commerce was that of surface water transport. That time is no longer with us. The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification. . . .¹³⁵

That tideland trust management merits such a flexible approach is amply buttressed by decisions in other jurisdictions. In *Diana Shooting Club v. Husting*,¹³⁶ the Wisconsin Supreme Court held that:

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. . . . They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provision of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit.¹³⁷

The Massachusetts case of *Inhabitants of West Roxbury v. Stoddard*¹³⁸ also merits some attention. That case concerned the public right to cut ice from water ponds, as affected by a 1641 Massachusetts charter that preserved the public right to go "fishing and fowling" in such waters. In ruling that current public needs required an expansion

134. *Id.* at 417, 432 P.2d at 9, 62 Cal. Rptr. at 407.

135. *Id.* at 420-23, 432 P.2d at 11-12, 62 Cal. Rptr. at 409-10. In *Miramar Co. v. City of Santa Barbara*, 23 Cal. 2d 170, 175, 143 P.2d 1, 3 (1943), the California Supreme Court also ruled that the public servitude over navigable waters contemplated pleasure boats as well as commercial vessels.

136. 156 Wis. 261, 145 N.W. 816 (1914).

137. *Id.* at 271-72, 145 N.W. at 820.

138. 89 Mass. (7 Allen) 158 (1863).

of the original purpose of the charter, the court held that:

With the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, become capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise.¹³⁹

The recent decision in *Hayes v. Bowman*¹⁴⁰ by the Florida Supreme Court puts the matter quite succinctly:

[T]his title is held in trust for the people for the purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people.¹⁴¹

The decision which goes furthest towards discouraging blind subservience to the traditional servitudes of commerce, the fisheries and navigation, however, is the recent ruling in *Zabel v. Tabb*¹⁴² where, for ecological reasons alone, the Corps of Engineers refused to grant plaintiffs a permit for dredging and filling certain tidelands on Boca Ciega Bay in Florida. The Corp's refusal represented a significant departure from past Corps policy because, by its own admission, the blocked project was to have no detrimental effect on navigation.¹⁴³ In upholding the Corp's decision, the circuit court of appeals ruled that the government was "entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago."¹⁴⁴ Clearly the court was assigning a value to ecological considerations that was meant seriously to contend for some of the weight and prestige given to the traditional servitudes governing tideland use. In doing so, it openly did what courts have been doing gradually and indirectly for years: freeing themselves from the straightjacket of illogically having to force the broad

139. *Id.* at 167.

140. 91 So. 2d 795 (Fla. 1957).

141. *Id.* at 799.

142. 430 F.2d 199 (5th Cir. 1970).

143. The court's opinion is somewhat restricted in its innovative character by the fact that the Corps was basing its action on the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 662(a) (1964), which required the Secretary of the Army to consult with the Fish and Wildlife Service and state conservation agencies before issuing a permit to dredge and fill to determine whether the alterations would damage wildlife resources; such consultation had been undertaken, and they were also opposed to the project. 430 F.2d at 202. See also 33 C.F.R. 209.120(d)(1) (1970), which provides that the Corps, in considering an application for a permit to fill, dredge, discharge or deposit materials, or conduct other activities affecting navigable water, will evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, esthetics, ecology, and the general public interest."

144. 430 F.2d at 201 (1970).

idea of the public interest into the narrow molds provided by the servitudes of "commerce," "the fisheries" and "navigation."¹⁴⁵ The test adopted in *Zabel* was clearly whether the proposal served the broad public interest, including concerns for environmental quality. Anything which ignored the ecological integrity of the area could not be condoned.

VII. The Public Interest in Environmental Quality

The tidelands of California are seriously threatened by the nature of past land use practices. Those practices have been characterized as being both "helter-skelter"¹⁴⁶ and often the precursor of "environmental crisis."¹⁴⁷ If freed from its traditional role as the promoter of commerce, the fisheries and navigation, the tideland trust could become an effective tool for bringing about necessary changes. Persuasive and authoritative precedent exists for incorporating new social needs into California's public trust management as those needs arise. Their application to broaden the scope of the tideland trust, however, is contingent on the state's judiciary recognizing that the continuation of past development practices in the tidelands is in direct contravention of a clear public interest in restoration of environmental quality.

This new public interest finds expression in practically all social spheres, obviating the necessity of dwelling on it at great length here. The Federal Government, for example, has enunciated a national policy that environmental considerations be given independent status as a crucial step in the decision-making process.¹⁴⁸ The President reiterated this policy when he ordered that in the future:

Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals.¹⁴⁹

He has also stated that:

Like those in the last century who tilled a plot of land to exhaustion and then moved on to another, we in this century have too casually and too long abused our natural environment. The time has come when we can wait no longer to repair the damage already done, and to establish new criteria to guide us in the future.¹⁵⁰

In addition to these policy statements, events on the tactical level also evince concern for the environment throughout a broad social spec-

145. See text accompanying notes 136-41 *supra*.

146. See note 6 & accompanying text *supra*.

147. See text accompanying note 12 *supra*.

148. National Environmental Policy Act, 42 U.S.C.A. § 4332 (1970).

149. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (1970).

150. Message by President Nixon to Congress on the Environment, Feb. 10, 1970, [1970] U.S. CODE CONG. & AD. NEWS 112.

trum. Numerous federal laws have been passed to protect the public from any further environmental deterioration,¹⁵¹ and the states have followed suit.¹⁵² Sundry governmental agencies have been created to serve as watchdogs in this area.¹⁵³ Additionally, there has been a sharp increase in environmental suits by citizen groups seeking to fill in the gaps when laws and agencies have fallen short of public aspirations.¹⁵⁴

It is always more difficult to add a new category to the list of needs said to make up the public interest than it is to argue that a recognized subject of public concern should be interpreted more liberally.¹⁵⁵ To be successful in broadening the scope of "public interest" one must act from an extremely broad base of popular support and that often requires a national emergency or disaster.¹⁵⁶ In the battle against further environmental deterioration there appears to be just such a situation if the multitude of legislative, judicial and scholarly comment to that effect is to be given any weight. Possibly, however, the urgency of the situation is best summarized in the following words:

This task is ours together. It summons our energy, our ingenuity and our conscience in a cause as fundamental as life itself.¹⁵⁷

There appears to be no problem in finding authority for the general proposition that "eco-management"¹⁵⁸ has arrived as a guiding principle in land management to replace the older one of "expediency."¹⁵⁹ Making an exception for the management of California's tidelands simply cannot be justified. Indeed, the extent to which the contrary is true has been concisely stated in a recent report made to the legislature wherein it was noted that:

Protection of the coastal zone of California is a high pri-

151. See, e.g., Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1151-75 (1970).

152. See, e.g., Williamson Act, CAL. GOV'T CODE §§ 51200-95, which offers tax incentives to landowners who agree to leave their land in open space uses.

153. In 1968 the California Environmental Study Council was created for the purpose of inquiring into the condition of the state's physical environment. It is authorized to hold hearings and to make environmental studies, reports and recommendations. See CAL. GOV'T CODE §§ 16000-81.

154. Cases of this sort are constantly appearing in the various reporters. Any attempt at listing them here would be both futile and misleading. The present major decisions in this area of the law are discussed in ENVIRONMENTAL LAW HANDBOOK 102-08 (Cal. Cont. Educ. Bar ed. 1970).

155. Braybrook, *The Public Interest: The Present and Future of the Concept*, in THE PUBLIC INTEREST 129, 151 (C. Friedrich ed. 1962).

156. See Friedmann, *The Changing Content of Public Interest*, in THE PUBLIC INTEREST 80, 85 (C. Friedrich ed. 1962).

157. Message by President Nixon to Congress on the environment, *supra* note 150, at 123.

158. See, e.g., Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 NAT. RES. L.J. 203 (1970).

159. See text accompanying note 5 *supra*.

ority need. Here . . . the major alterations to California's land and water environment are taking place.

Within the coastal zone, there is a variety of scarce environments, such as bays, estuaries and lagoons with fish, wildlife and other resources which are dependent on such habitat. These areas plus the beaches and adjoining lands are often the last remaining natural and scenic spots amid urban sprawl.

These irreplaceable environmental values are threatened only briefly, for once the planned developments materialize the threat is over. In its stead are irreversible changes. Immediate action must be taken to prevent the destruction of these environmental values.¹⁶⁰

Responding adequately to this and to similar legislative mandates will be one of the more challenging tasks for California courts in the future. As the state's population continues to expand rapidly, developers will continue to exert increasing pressures on California's tidelands. What the courts ultimately do to alleviate these pressures will be determined by how restrictively they view the public interest under the tidelands trust.

VIII. Conclusion

There is no fixed argument guaranteed to halt any and every proposed tideland project; indeed, some future projects will inevitably be necessary and good. There is, however, need of a new *approach* which will put proposed projects into proper perspective. Even though the traditional trust concern for commerce, the fisheries and navigation has undeniable importance in the wise utilization of California's tidelands, other considerations have now assumed positions of peculiar prominence. Stated categorically, the ecological integrity of the tidelands is seriously threatened; the state as trustee of those lands should be most vigilant.

What is required first is a revitalization of the tidelands trust. The utilization of California's tidelands has, for too long, been based on legal, economic and political considerations which have almost totally ignored the ecological context in which those lands are found. Environmental advocates will undoubtedly attempt to expand the scope of the trust on the basis of the recent legislative and judicial acknowledgement of the importance of ecological principles. If the courts listen, the legacy of the state's past need not be accepted as the pattern for the future.

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160. CALIFORNIA ASSEMBLY SELECT COMM. ON ENVIRONMENTAL QUALITY, *supra* note 108, at 36.

* Member, Third Year Class